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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~529~~ 36

FRED T. MACKEY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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FRED T. MACKEY,

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UNITED STATES OF AMERICA,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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Fred T. Mackey, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on June 4, 1969.

OPINION BELOW.

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) is reported in 411 F. 2d 504. The opinion of the District Court below (Appendix B, *infra*, p. 10a) was not reported.

JURISDICTION.

The judgment of the Court below (Appendix C, *infra*, p. 23a) was entered on June 4, 1969. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, which held that the filing of wagering excise tax returns violate a taxpayer's privilege against self-incrimination must be applied retrospectively in a 28 U.S.C. Sect. 2255 proceeding to a conviction for income tax evasion founded in part upon the admission in evidence of such wagering tax returns.

2. Whether a defendant-taxpayer in a criminal income tax evasion case is deprived of due process of law when his conviction is founded in part upon involuntary confessions of the illegal activity of gambling, and when such illegal activity is admittedly a link in the chain of evidence needed to prosecute and convict in the income tax evasion case.

3. Whether there ever is any justification in law or in fact for a court to refuse to vacate and set aside a criminal conviction after it has become final, when such criminal conviction was obtained in part upon an involuntary and coerced statement which was a link in the chain of evidence needed to prosecute and convict.

4. Whether a failure to claim the privilege against self-incrimination at trial when wagering tax returns were offered in evidence was a waiver of the privilege, where other objection to the admission of the exhibits was made, and where there was no indication or intimation either from the trial record or the state of the law existing at that time that the defendant deliberately designed to knowingly forego a federal constitutional claim.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

1. The Fifth Amendment, United States Constitution.

2. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was Sect. 7201, I.R.C., 1954, which provided as follows:

> "§ 7201. *Attempt To Evade Or Defeat Tax*
>
> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by his title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution."

3. The statute under which Petitioner sought post conviction relief was 28 U.S.C. Sect. 2255 which provides as follows:

> "§ 2255. *Federal Custody: Remedies On Motion Attacking Sentence*
>
> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT.

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceedings in the Section 2255 case now before this Court.

On January 21, 1964, in a cause then pending in the United States District Court for the Northern District of Indiana, Hammond Division, entitled *United States* v. *Mackey,* Criminal No. 3411, Petitioner was found guilty by a jury on an indictment of five counts charging violations of 26 U.S.C. 7201, 1954 Internal Revenue Code, for the years 1956 through 1960 (App. 2).[1]

On March 24, 1964, the District Court entered judgment and Petitioner was sentenced to five years imprisonment on each count to run concurrently, and was fined $10,000.00 on each count. This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit, *United States* v. *Mackey,* No. 14584, 345 F. 2d 499 (1965)[2] and a petition to this Court for a Writ of Certiorari thereto was denied (382 U.S. 824). Petitioner was serving his sentence when the motion under Section 2255 was filed in the District Court. He is presently released on parole.

On February 12, 1968, Petitioner filed the motion in the case at bar under 28 U.S.C. 2255 to vacate and set

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[1] All citations following unless otherwise indicated are to the Appellant's Appendix in the Court of Appeals in the Sect. 2255 appeal contained in the transcript of record filed herewith.

[2] The certified record on appeal and briefs in that case have been filed in this Court with this Petition.

aside his judgment of conviction (App. 2-22). No answer thereto was required by the District Court or filed by the Government. Briefs in support and opposition were filed by each of the parties. No hearing was held.

On August 13, 1968, the District Court entered its order denying the Motion under 28 U.S.C. Sect. 2255 (App. 22). On September 6, 1968, the District Court issued its Memorandum in support of this order (Appendix B, *infra.*).

On September 13, 1968, Petitioner filed his Notice of Appeal (App. 51). On October 16, 1968 the parties filed in the Court of Appeals a Stipulation containing 15 copies of the 60 Form 730, Wagering Tax Returns which are in issue in this cause (App. 36-41).

B. Relevant facts concerning the underlying conviction for income tax evasion.

The relevant facts are contained in Petitioner's Motion under 28 U.S.C. Section 2255 (App. 2-21). During Petitioner's criminal trial in the District Court, the Government offered as Government's exhibits 30 thru 89 inclusive, sixty (60) monthly Form 730 wagering excise tax returns previously filed by Mackey pursuant to 28 U.S.C. Sect. 4401 and Treas. Reg. No. 44.6011(a)-1(a) (App. 3; 7-19; 36-41). Petitioner objected to the admission of these returns on the grounds they were offered for the purpose of inflammatory prejudice and bias and for the purpose of getting something into evidence that the Government had otherwise not been able to do (App. 7; 15).

The District Court below characterized these exhibits as "somewhat inflammatory" (App. 13) but admitted the returns (App. 14). The Government then argued to the jury that these returns showed a likely source of income (App. 20-21), and in the Court of Appeals on appeal in the criminal case argued that the admission of these returns "constituted a part of the Government's case on the important issue of a likely source of unreported taxable income" (App. 4; p. 43 of Government's Brief in the Court of Appeals in *U. S.* v. *Mackey,* No. 14584). The District Court below in disposing of Petitioner's motion under Sect. 2255 held that the establishment of a likely source of unreported income was a "crucial step" in prosecuting Petitioner (Appendix B, *infra,* p. 10a).

The trial lasted seven weeks. The jury deliberated five days, averaging more than twelve hours a day (Petitioner's Brief in the Court of Appeals in No. 14584, p. 3).

One important point needs noting here. The Court of Appeals below noted (Appendix A, *infra,* p. 2a) that upon the prior appeal, that Court stated: "Defendant concedes that he was a policy wheel operator during the years in question." This concession was made in briefs and argument in the Court of Appeals on appeal in the criminal case. Petitioner rested at the close of the Government's case in the tax evasion trial. The only statement made to the jury by the Petitioner about "policy" was in final argument to the jury in an effort to blunt the prejudicial effect of the admission of the wagering tax returns (Appellant's Appendix in No. 14584, Vol. IV, p. 1908-1910).

REASON FOR GRANTING THE WRIT.

A.

The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

This is a coerced confession case. At the time of Petitioner's criminal trial, this Court had previously held that the filing of the wagering excise tax returns was not protected by the privilege against self-incrimination: *United States* v. *Kahriger,* 345 U.S. 22 and *Lewis* v. *United States,* 348 U.S. 419. After Petitioner's conviction had become final, this Court overruled these decisions and held that the statute which compelled taxpayers to file wagering excise tax returns provided the Government with evidence for use in criminal investigations and prosecutions, and thus violated a taxpayer's privilege against self-incrimination, *Marchetti* v. *U. S.,* 390 U. S. 39; *Grosso* v. *United States,* 390 U.S. 62. In *Marchetti* (p. 48), this Court took note of statements of former Commissioner Caplin (8 Crime & Delin, 371, 372, 373, 378) that the I.R.S. used information obtained pursuant to the wagering tax statutes to obtain convictions for evasion of income taxes as well as wagering taxes. Of course, the wagering tax returns were admitted in evidence in the case at bar.

It was conceded by the Government that the admission of these sixty wagering tax returns was to show a likely source of unreported income, and constituted an important part of the Government's case on this issue (p. 8, *supra.*). The District Court, in these Sect. 2255 proceedings, further conceded that the question of wheth-

er the admission of these returns violated the privilege against self-incrimination "raises a new and serious question" (Appendix B, *infra*, p. 11a). Neither Court below questioned that these returns constituted a link in the chain of evidence needed to convict Petitioner.

Thus, in view of the fact that these returns constituted a link in the chain of evidence needed to convict, they fall within the protection of the privilege even if they do not constitute an express confession or admission of all of the elements of the crime charged, i.e. income tax evasion; *Harrison* v. *United States*, 392 U.S. 219; *Malloy* v. *Hogan*, 378 U.S. 1; *Albertson* v. *SACB*, 382 U.S. 70; *Murphy* v. *Waterfront Commissioners*, 378 U.S. 52.

It is also settled that the truth of these admissions of gambling does not remove them from the protection of the privilege, for "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction"; *Jackson* v. *Denno*, 378 U.S. 368, 376.

In reaching its decision to affirm, the Court below decided that these settled principles were not to be applied to the case at bar because a.) Mackey's confessions of gambling were truthful and his will was not overborne by physical coercion or intimidation (Appendix A, *infra*, p. 7a), and b.) this Court's recent decisions delineating the criteria to be followed in determining retrospectivity in other types of constitutional case prohibit retrospectivity in the case at bar (Appendix A, *infra*, p. 4a *et seq.*), and c.) Petitioner waived the privilege by not claiming it at trial (Appendix A, *infra*, p. 3a *et seq.*).

We respectfully urge that this decision is erroneous and at variance with this Court's decisions in the following respects:

a.) The truthful statement and no coercion reason for affirming.

We believe this is the heart of the Court of Appeal's decision (Appendix A, *infra*, p. 7a). Such reasoning not only is at variance with this Court's decisions, e.g. *Jackson* v. *Denno*, 378 U.S. 368, but it is a retreat through the long agonizing history of the privilege to the bloody struggles between the Stuarts and Parliament in the 17th Century. This argument, i.e., that the statement may be used because it is in any event truthful, has always been the justification for the use of a coerced confession. It was the justification for Star Chamber and the oath *ex officio*. It was the justification for *auto da fe*, the rack and the stake. For why would a person confess unless he was telling the truth?

True it is that Petitioner was not tortured or racked. These were 17th Century methods. But Petitioner was coerced in the more civilized but not less effective ways of the 20th Century. For it is a simple fact as noted by this Court in *Marchetti* and *Grosso*, that had Petitioner not filed the wagering tax returns admitted in evidence against him, *he faced imprisonment and heavy fines as a punishment for such a failure*. Thus, he faced imprisonment for not filing the returns, and went to prison because he did file the returns. To say that Petitioner was not coerced or intimidated into filing the wagering tax returns is simply unreal. And, as reaffirmed by this Court in *Jackson* v. *Denno*, 378 U.S. 368, 376, the question of whether these returns were true or false is quite irrelevant to the question of whether his conviction must

now be reversed because of the use of these coerced confessions. What is decisive is that in the case at bar, the Government punished Petitioner by the use of evidence produced not by its own independent labor, but by the cruel simple expedient of compelling it from his own mouth; *Malloy* v. *Hogan*, 378 U.S. 1, 8.

b.) The non-retrospectivity reason for affirming.

We deem it unnecessary to outline in this petition the entire thrust of this Court's recent decisions concerning retrospectivity. It is sufficient to say that this case is not a case involving in-custody interrogation procedures. It is not a case wherein improved police procedures and methods are sought. It is not a case wherein federal constitutional protections at trial are now to be fastened upon the States. This case is not a *Miranda* or *Escobedo* type of situation where intimidation or coercion is not in fact found, but in-custody admissions are held to be inadmissible because of improper police or interrogation procedures.

These type of cases are new cases, but the case at bar is an ancient case. We respectfully believe that the Court of Appeals below, in struggling with the complexities of the new, failed to recognize what was both ancient and settled.

On June 2, 1969, this Court decided *Jenkins* v. *Delaware*, 395 U.S. 213, and again denied retrospectivity in the case before it. But this Court very carefully pointed out (p. 221) that "an individual who cannot claim the benefits of *Miranda* may still resort to whatever state and federal procedures are available to insure that statements admitted against him were made voluntarily." In the numerous retrospectivity cases recently before it,

this Court has always been careful to mark out and define this area as always subject to retrospective application; *Johnson* v. *New Jersey*, 384 U.S. 719, 730; *Linkletter* v. *Walker*, 381 U.S. 618, 638; *Jackson* v. *Denno*, 378 U.S. 368; *Tehan* v. *Shott*, 382 U.S. 406, 415-416.

Thus, the criteria relied upon by the Court below (Appendix A, pp. 4a-9a) for denying retrospectivity have no relevance to the case at bar. Because the conviction of Petitioner is based in part upon involuntary and coerced admissions which were a link in the chain of evidence needed to convict, the conviction must be set aside.

c.) The waiver of privilege at trial reason for affirming.

In its opinion (Appendix A, p. 3-4), the Court of Appeals seems to hold that the failure of Petitioner to claim the privilege at trial would be a sufficient ground upon which to affirm. This is clearly erroneous in light of this Court's recent decision in *Leary* v. *United States*, 395 U.S. 6, 27-28; cf. *Harris* v. *United States*, 8 Cir., 390 F. 2d 616 (1968); *United States* v. *Fay*, 2 Cir., 333 F. 2d 12, 16 (1964); *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78. Both Courts below, reasoning very closely, decided that *Kahriger* and *Lewis* only decided the *occupation* taxes aspect of the gambling tax scheme and left the *wagering* tax aspect open. Thus, they decide that Petitioner had a privilege which he should and could have raised to the use of the wagering tax returns. This is very close after-the-fact reasoning concerning a constitutional claim. Petitioner can find no other authority which has so limited the thrust of *Kahriger* and *Lewis*.

The Solicitor General of the United States believed that *Kahriger* and *Lewis* covered the wagering tax aspect

of the gambling tax scheme and so argued in this Court; *Brief of the United States, Grosso* v. *United States*, No. 12, Oct. Term, 1967, p. 17. Other courts have held *Kahriger* and *Lewis* to apply to wagering tax returns; *U. S.* v. *Fincher*, 2 Cir., 391 F. 2d 603, 604 (1968); *U. S.* v. *Manfredonia*, 2 Cir., 391 F. 2d 229 (1968); *Greenwood* v. *U. S.*, 4 Cir., 392 F. 2d 558 (1968).

Thus, it has been universally conceded that Petitioner legally had no privilege at trial which he could invoke. But of equal importance is the *fact* that he did not knowingly waive a privilege which he fairly believed he did not have. In order to waive a constitutional right at trial, there must be a deliberate design, or a strategic trial choice, to forego the federal constitutional claim; *Ledbetter* v. *Warden*, 4 Cir., 368 F. 2d 490 (1966), cert. den. 386 U.S. 971; cf. *Jarrell* v. *Boles* (N.D., W.Va., 1967) 272 F. Supp. 755; *U. S.* v. *Myers*, (E.D., Pa., 1967) 276 F. Supp. 748. It certainly cannot be argued that Petitioner or his counsel deliberately allowed these Forms 730 in evidence as a deliberate design or a strategic trial choice. Their admission was vigorously objected to on the grounds they would prejudice the jury. Given the state of the law as laid down in *Kahriger* and *Lewis*, this was the only reasonable objection that could be made to their admission at that time.

B.

The Court of Appeals has decided on important questions of federal law which has not been, but should be, settled by this Court.

The Court of Appeals below (Appendix A, p. 5a) noted that whether the principles in *Marchetti* and *Grosso* are to be retroactively applied has yet to be answered di-

ctly by the Supreme Court. We do not paint with that oad a brush, because, as that Court further notes, the se of a person who was convicted for failure to file wagering tax return is not before this Court on this etition. But in a larger sense, we present to this Court more fundamental question for review, i.e., can a conction which is admittedly based in part upon a coerced nfession of an illegal activity which is a link in the ain of evidence needed to convict be allowed to stand. his Court has always held in the negative, and we ink it important that this Court reiterate this prinple by making *Marchetti* and *Grosso* retroactive in this se.

CONCLUSION.

The judgment below is a unique and salutory depare from decisions of this Court which require that nvictions based upon coerced statements be set aside any time after conviction. As such, it represents a each in the wall erected by the Fifth Amendment to e Constitution and the decisions of this Court which re designed to protect a citizen from being convicted his Government through the use of statements involarily wrung from him. This petition for a writ of cerrari should therefore be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

No. 17200
FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 4, 1969

Before CUMMINGS and KERNER, *Circuit Judges* and HOFFMAN, *District Judge.*[1]

HOFFMAN, *District Judge.*

The question presented for decision is whether a conviction for income tax evasion should be set aside on collateral attack because the trial court admitted into evidence the defendant's federal gambling tax returns which, the Supreme Court has subsequently held, the defendant could not have been required to file over a timely claim of the privilege against self-incrimination. We conclude that the question must be answered in the negative, and affirm.

Defendant was convicted on March 24, 1964, of five charges of income tax evasion committed by means of false and fraudulent returns for the calendar years 1956 through 1960, in violation of Section 7201, Internal Revenue Code of 1954, 26 U.S.C. Sec. 7201. He was sentenced

[1] Judge Hoffman is sitting by designation from the United States District Court for the Northern District of Illinois.

to concurrent terms of five years imprisonment, and a fine of $10,000, on each count. Upon a prior appeal, this Court affirmed the conviction, 345 F. 2d 499 (1965), and the United States Supreme Court denied certiorari, 382 U.S. 824.

The prosecution proceeded upon a net worth theory, predicated upon a showing that defendant's total assets had increased during the period in question by an amount which could not be accounted for by his reported income. In such a prosecution, "[p]roof of a likely source, from which the jury could reasonably find that the net worth increase sprang," is an essential element of the case. *Holland* v. *United States,* 348 U.S. 121, 138 (1954). As stated upon the prior appeal, "Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week . . . was from profits earned by defendant on this operation." 345 F.2d, at 501. This theory was borne out by the proof. "Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was obtained from his policy wheel operation. Direct evidence is not required." 345 F.2d, at 506-507.

One type of proof establishing this likely source of unreported income was a series of sixty monthly federal gambling excise tax returns filed by defendant during the years in question. These returns, on Form 730, were required to accompany the payment of the ten per cent excise tax on wagering receipts imposed by Section 4401 of the Internal Revenue Code, 26 U.S.C. Sec. 4401; Treas. Reg. Sec. 44.4011(a)-1(a). At the trial, defendant objected to the introduction of these returns on the ground that they were cumulative, since their contents were disclosed by Schedule C to the income tax returns already in evidence, and were prejudicial and inflammatory. The District Court overruled this objection, and this Court affirmed, without specific discussion, finding "no prejudicial error." 345 F.2d, at 507. In neither court did the defendant claim that the returns infringed his constitutional privilege against self-incrimination. With the de-

nial of certiorari, the judgment became final and defendant began serving his sentence in December, 1965.

On January 29, 1968, the United States Supreme Court handed down its decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, holding that the federal wagering tax laws violated the privilege against self-incrimination, and that a claim of that privilege bars a prosecution for failure to register, report, or pay the taxes imposed by those laws. Immediately thereafter, defendant filed his motion under Section 2255 of the Judicial Code, 28 U.S.C. Sec. 2255, to set aside the judgment of conviction on the authority of these decisions. Defendant has appealed to this Court from the District Court's denial of this motion.

I.

At the threshold, we are met by the Government's argument that proceedings under Section 2255 are not a substitute for a direct appeal, and are not ordinarily available to set aside a final conviction on the ground that evidence was erroneously introduced and admitted. That argument, supported by a number of decisions in other Circuits, has been put to rest by the Supreme Court's decision in *Kaufman* v. *United States,* 394 U.S. ....., 889 S. Ct. 1068 (March 24, 1969). Sustaining a motion under Section 2255 based on the admission of evidence produced by unlawful search and seizure in violation of the Fourth Amendment, the Court concluded broadly that, in enacting the Section, "Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack." 394 U.S., at ....., 89 S. Ct., at 1075. Since defendant's claim is premised on the Constitution, his remedy is not foreclosed.

Defendant's motion under Section 2255 rests wholly upon his claim that the reception into evidence of the Form 730 wagering excise tax returns infringed his privilege against self-incrimination conferred by the Fifth Amendment. He did not, however, decline to file the returns, nor did he, when filing them, raise any protest upon that ground. No claim of the privilege was made at the trial, to support his objection to the admissibility of the exhibits, and no question of self-incrimination was presented to this Court in the course of the prior ap-

peal. These failures to invoke the privilege do not work a waiver, in defendant's view, since his silence resulted from reliance upon the Supreme Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), holding that the wagering taxes did not violate the privilege against self-incrimination. Until these decisions were overruled, after his conviction had become final, by the subsequent decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the defendant reasons, he had no support for a claim of privilege, and his failure to make the claim must be excused.

As the District Court demonstrates in its closely reasoned opinion, a careful reading of the authorities casts doubt on this attempted justification. The prior decisions in *Kahriger* and *Lewis* involved a different tax from the tax here involved: they held only that the wagering *occupation* tax (26 U.S.C. Sec. 4411), as distinguished from the *excise* tax here in issue (26 U.S.C. Sec. 4401), did not violate the privilege against self-incrimination, in part upon the rationale that the occupation tax, to be paid annually in advance, did not involve any possible incrimination for *past* crimes. See *United States* v. *Kahriger*, 345 U.S. 22, 32-33 (1953). The excise tax, imposed upon wagering receipts after the fact, would not necessarily survive under this rationale, and the defendant in *Grosso* v. *United States*, 390 U.S. 62 (1968), recognized this distinction by raising a plea of self-incrimination to the charge of failure to pay the *excise* tax here involved, but not to the charge of failure to pay the occupation tax considered in *Kahriger* and *Lewis*, where the plea would have been futile. Moreover, as the District Court points out, all four of the Supreme Court decisions involved a failure to file the required returns; none directly adjudicated the admissibility of returns already filed by the defendant without objection.

II.

There is, however, a more fundamental flaw in defendant's motion. To avoid the consequence of waiver from his failure to claim the privilege, he asserts that the *Marchetti* and *Grosso* decisions worked a marked change in the law. That assertion inevitably presents the ques-

ion whether those decisions should be applied retroctively, as the standard for review of judgments aleady final when the new principles were declared, or vhether the commands should be confined to prospective pplication. In a line of cases tracing back to *Linkletter* . *Walker,* 381 U.S. 618 (1965), the Supreme Court has nade it plain that decisions establishing new principles f constitutionality in criminal litigation do not necesarily or automatically apply to cases already closed. The Court may in the interest of justice make the rule rospective . . . where the exigencies of the situation require such an application." 38 U.S., at 628.

Whether the principles of *Marchetti* and *Grosso* are to e retroactively applied has yet to be answered directly y the Supreme Court. The criteria which control the uestion are nonetheless clearly delineated. The retroctivity or nonretroactivity of the decisions in a funcion of three considerations: "(a) the purpose to be erved by the new standards, (b) the extent of the reiance by law enforcement authorities on the old standrds, and (c) the effect on the administration of justice f a retroactive application of the new standards." *Desist . United States,* 394 U.S. ....., 89 S. Ct. 1030, 1033 March 24, 1969); *Stovall* v. *Denno,* 388 U.S. 293, 297 1967); *Johnson* v. *New Jersey,* 384 U.S. 719, 727 (1966). Foremost among these factors is the purpose to be erved by the new constitutional rule. Falling on one side f the line are standards laid down under the Sixth Amendment, intended to protect the integrity of the factinding process and the fairness of the trial itself, which ave been applied retroactively under this test. Thus enial of the right to counsel in any stage of the judicial roceedings taints the validity of any action taken, and arrants relief against the consequences. See, for exmple, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968) denial of counsel at preliminary hearing); *McConnell . Rhay,* 393 U.S. 2 (1968) (denial of counsel at hearing n revocation of probation). The right to confront adverse witnesses, similarly guaranteed by the Sixth Amendnent, is attended to assure the reliability of findings of act by subjecting the testimony to cross examination, purpose which calls for retrospective relief. See *Roberts*

v. *Russell,* 393 U.S. 393 (1967) (confession of co-defendant); *Berger* v. *California,* 393 U.S. 314 (1969) (prior testimony of absent witness); *Bates* v. *Nelson,* 393 U.S. 16 (1968). On the other side of the line, the Fourth Amendment's prohibition against unreasonable searches and seizures, and federal anti-wiretapping laws, are intended to preserve privacy, and the resulting exclusionary rules of evidence are adopted not to exclude unreliable evidence but to deter illegal police action. Retroactive application of such exclusionary rules is not justified when the "misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved." *Desist* v. *United States,* 394 U.S. ....., 89 S. Ct. 1030, 1034 (March 24, 1969); *Fuller* v. *Alaska,* 393 U.S. 80 (1968); *Linkletter* v. *Walker,* 381 U.S. 618 (1965).

Within the scope of the Fifth Amendment, the purpose of the Due Process clause to assure fundamental fairness has been held to require retroactivity for rules concerning the presentation of coerced confessions to the jury, *Jackson* v. *Denno,* 378 U.S. 368 (1964), or concerning line-up procedures which are inherently conducive to mistaken identification. *Foster* v. *California,* 394 U.S. ....., 89 S. Ct. 1127, 1128 (March 24, 1969). On the other hand, cases arising under the Fifth Amendment's privilege against self-incrimination involve the congeries of purposes, including the privacy of the individual and the adversary system of adjudication, which that privilege embodies. The "Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. * * * As we pointed out in Linkletter with respect to the Fourth Amendment rights there in question, 'the ruptured privacy . . . cannot be restored.'" *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966). On the basis of these limits of purpose, the Court held that its reinterpretation of the scope of the privilege against self-incrimination did not warrant retroactive application. The holding is re-confirmed in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

(Opinion of the United States Court of Appeals)

Defendant contends, however, that the wagering tax returns constitute coerced confessions, since they were filed under the compulsion of a legal command, and that retroactivity follows automatically once the question is so characterized. But the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which make a confession involuntary and a denial of Due Process. See, for example, *Davis* v. *North Carolina,* 384 U.S. 737 (1966); *Boulden* v. *Holman,* 394 U.S. ....., 89 S. Ct. 1138, 1139-40 (March 24, 1969). Here there is no suggestion that the defendant's will was overborne, by physical intimidation or coercion, to lead him to a false admission that he was engaged in gambling. The interrogation to which he responded, by filing the wagering tax returns, was addressed to the public at large. Certainly he was subject to a lesser degree of compulsion than a lone defendant singled out by accusation and deprived of personal liberty and support while he is subjected to in custody interrogation by the police. Although such circumstances combine to make the defendant's "statements the product of compulsion" in violation of the policy of the privilege against self-incrimination, as declared in *Miranda* v. *Arizona,* 384 U.S. 436, 466 (1966), the Supreme Court has held that the new rule excluding confessions so compelled is not to be given retroactive effect. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). The unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws. Cf. *Stovall* v. *Denno,* 388 U.S. 293 (1967) (non-retroactivity of requirement of counsel during line-up procedures); *DiStefano* v. *Woods,* 392 U.S. 631 (1968) (non-retroactivity of jury trial for serious criminal contempts).

In deciding that the purpose of the rules announced in *Marchetti* and *Grosso* (390 U.S. 39 and 62), does not call for retroactivity in the case before us, we do not mean to intimate how the different question of retroactivity would be decided in other situations. Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of Kahriger and Lewis themselves (345 U.S. 22; 348 U.S. 419), who have claimed the privilege and have been convicted of failure to file

the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned. See *Graham* v. *United States,* ..... F. 2d ..... (6th Cir., March 10, 1969), denying retroactivity in that situation. Here the defendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes. The purpose of the rule of *Marchetti* and *Grosso* has no application to warrant retroactively here. Its object was to protect the individual against self-incrimination under the "comprehensive system of federal and state prohibitions against wagering activities . . ." *Marchetti* v. *United States,* 390 U.S. 39, 48 (1968). If gambling were not a crime, or if defendant had been granted immunity from all gambling prosecutions, he could have claimed no privilege by reason of potential income tax jeopardy against filing the required wagering excise tax returns, any more than against the filing of the income tax return itself. See *United States* v. *Sullivan,* 274 U.S. 259 (1927). In this prosecution, the returns were no more incriminating than a report of any lawful business activity as a likely source of unreported income. Under the circumstances, the purpose of *Marchetti* and *Grosso* is extraneous to the conviction, and does not call for retrospective application.

The factors of reliance and administrative difficulty which control, along with purpose, the prospective or retroactive effect of the new rule lead to the same conclusion of nonretroactivity. An avowed purpose of Congress in enacting the wagering tax system was to provide information to interested prosecuting authorities. *Marchetti* v. *United States,* 390 U.S. 39, 58-59 (1968). This object was aided by the Supreme Court's earlier decisions in *Kahriger* and *Lewis,* sustaining the constitutionality of the scheme. Law enforcement officers were thus expressly invited to make use of the information disclosed, and to abandon their pursuit of evidence through other channels in reliance upon congressional and judicial approval of this offered source. Retroactivity was denied in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), when the law enforcement officials were guilty of a plain violation of federal laws against wiretapping, and had relied only upon a judicial failure to enforce the laws by

excluding the resulting evidence in state courts. Here the evidence was gathered with the blessings of federal law. Reliance was accordingly justified and extensive. "Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained.'" *Marchetti* v. *United States* 390 U.S. 39, 47-48 (1968).

As a result of such reliance, the burdens which would be imposed upon the administration of justice by retroactive application of the ruling would be formidable. The third factor among the criteria of prospective effect is thus also satisfied. With a rule of retroactivity, every gambling conviction could be re-opened upon a claim that disclosures under the federal laws had contributed to the conviction. The rule would require the courts to re-examine the total evidence in each case, and "would necessarily oblige the state [or federal] prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . ." *Marchetti* v. *United States,* 390 U.S. 39, 59, (1968). See also *Desist* v. *United States,* 394 U.S. ....., 80 S. Ct. 1030, 1033 (March 24, 1969).

It follows that the District Court correctly denied defendant's motion to set aside the conviction under Section 2255.

Judgment Affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

MEMORANDUM

Plaintiff was indicted in March, 1963, for "willfully and knowingly attempt(ing) to evade and defeat a large part of the income tax due and owing by him and his wife for the calendar year(s) of 1956 (through) 1960 by willfully preparing and causing to be prepared • • • false and fraudulent income tax return(s) • • • in violation of section 7201 Internal Revenue Code; 26 U.S.C. Section 7201." He was found guilty by a jury and the conviction affirmed on appeal. *United States* v. *Mackey*, 345 F.2d 499 (7th Cir. 1965), *cert. den.*, 382 U.S. 824, 15 L. ed. 2d 69 (1965). The Government presented its case on the net worth method—it attempted to show that the petitioner's net worth increased during the subject period in an amount unaccounted for by his reported income and non-taxable sources. A crucial step in prosecuting a case under this method is the establishment of a probable source of the unreported income, in this case "pol-

icy" or gambling. One type of proof offered to establish this probable source of unreported income were Government Exhibits 30 through 89, which were monthly gambling excise tax returns, Form 730, required to be filed by one who is subject to the excise tax on wagering. (Title 26 U.S.C. §4401, Treas. Reg. §44.4011(a)-1(a)). These returns were objected to at trial on the grounds that they were inflammatory, prejudicial, and irrelevant, but not on the ground that their admission violated the plaintiff's right against self-incrimination. Although the Appellate opinion did not expressly consider these items, it is obvious that they are referred to in the paragraph at 345 F. 2d 499, 507 (7th Cir. 1965) which stated:

> Defendant raises various other issues, inter alia; whether the trial judge properly admitted certain evidence; . . . we have carefully considered these and all other issues raised by defendant and find no prejudicial error.

This constitutes a final ruling on those objections raised at trial and on appeal, and they are not considered here. The plaintiff however raises a new and serious question with respect to these items: whether their admission violated his privilege against compulsory self-incrimination as guaranteed by the Fifth Amendment to the Constitution.

These returns were filed as part of a comprehensive system for the taxation of wagering. Title 26 U.S.C. §4401 imposes an excise tax on wagers equal to ten per cent of the amount thereof. Title 26 U.S.C. §4403 provides that every person liable for the tax, meaning those engaged in the business of accepting wagers, shall keep a daily record showing the gross amount of wagers. To collect

these taxes, Treas. Reg. §44.6011(a)-1(a) requires the taxpayer to submit a Form 730 each month showing the wagers collected, etc. Although not required by the statute, the Internal Revenue Service will not accept the tax without the form. (See *United States* v. *Grosso*, 19 L. ed. 2d 906, 910-11 (1968)). Also part of this same system is the occupational tax on engaging in the business of accepting wagers. Title 26 U.S.C. §§4411-4414.

The effect of these statutes has been severely limited by the decisions of the Supreme Court in *Grosso* v. *United States*, 19 L. ed. 2d 906 (1968); and *Marchetti* v. *United States*, 19 L. ed. 2d, 889 (1968). In *Marchetti* the Court held that a plea of compulsory self-incrimination was a bar to prosecution for failure to comply with the wagering occupation tax, and *Grosso* held the same with respect to the wagering excise tax. *Grosso* also held that defendant's failure in that case to raise the Fifth Amendment question, with respect to a charge of failing to pay the occupation tax, did not waive his right against self-incrimination to that Count. There are three salient features of the opinions of importance in this case. A careful examination of the cases shows that the Court based its decisions on the widespread and almost total criminal prohibition against gambling of the type taxed. It found that a defendant subject to the tax was operating in the shadow of criminal penalties imposed by both State and Federal governments. This, coupled with the fact that Congress had provided for disclosure of all information garnered in connection with the occupation tax, and that the Internal Revenue Service revealed excise tax information to law enforcement officers as a matter of policy, led the Court to find that this scheme

seriously abridged the gamblers' right against self-incrimination. The Court held, in both cases, that a plea of self-incrimination would be a bar to prosecution. A defendant in a *criminal* prosecution for failure to pay the tax or abide by the ancillary requirements could not be convicted if he stated that to have abided by the requirements would have incriminated him.

Second, the Court did not strike down either tax. In *Marchetti,* it said, at 19 L. ed. 2d 889, 905:

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

Third, while the Court did not expressly deal with the admissibility of forms and returns filed in compliance with these acts either before or after its decisions, it did, over the vigorous objection of the Chief Justice, refuse to adopt a rule which would prohibit disclosure of information obtained under the acts rather than prohibit punishment for their violation. The Government had suggested prohibiting disclosure in an effort to save the criminal penalties associated with the tax and the Government's ability to collect the tax itself. The Court found that the Congressional purpose in requiring disclosure was so strong that it should not adopt the tendered alternative. In addition, this Court will have to consider the retroactive effect of the principles (although not the rule) adopted, and the possibility that the plaintiff here may have, at some point, waived any privilege with respect to these documents.

(Opinion of the United States District Court)

The first point is immediately in dispute. Mackey wa not charged with violating gambling laws. He was charge with income tax evasion. The fact that the Exhibits i question showed that he was guilty of other crimina activity, not directly relevant to this trial, has alread been considered by this Court and the Court of Appeals and will not be reconsidered. That there is no privileg against incriminating one-self by filing income tax re turns and keeping required records is too well established to require discussion. That was all these returns were used for in this case. They pointed to a possible source —whether legal or illegal is irrelevant—of income. They showed that the defendant Mackey could have earned more than he reported. It is certain that the Supreme Court would not have jeopardized the gambling tax scheme on the ground that required returns would have incriminated someone of having income or a source of income not reported on his income tax returns. Any possible compulsory self-incrimination involved in filing these returns was simply not relevant to the case at bar. Defendant was not charged with, and was not convicted of violation of the gambling laws.

Secondly, it is spurious to argue that the information gathered and introduced into evidence was a produce of unconstitutional statutes. As stated earlier, the Court did not find these statutes to be unconstitutional. Instead it held that it was unconstitutional to punish someone for failing to supply the information required by the statutes and attendant regulations. Exhibits 30 through 89 were therefore, not the fruits of an unconstitutional scheme.

Thirdly, the Court itself refused to find that these re turns, once filed, should be made confidential. Of course

in the future a person will not be able to claim that he was compelled to give evidence against himself after he files a return. He could have refused to file a return and the *Marchetti* and *Grosso* decisions would protect him from punishment. The issue here is whether a defendant who files returns prior to the decisions may claim that he was compelled to do so in violation of his constitutional rights.

There are two basic reasons for the prohibition against self-incrimination and the use of coerced confessions—their unreliability and the sanctity of the individual. They are unreliable because a person under severe physical and/or mental pressures may confess to a crime he did not commit solely to escape the torment imposed by his interrogators. This was the primary policy behind the rule which excluded only coerced confessions while admitting those which were voluntary, even if made without knowledge of one's rights. That rule, of course, has now been supplanted by one which looks not merely to the voluntariness of the confession, but also to the intelligent waiver of the right against self-incrimination. *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. ed. 2d 694 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. ed. 2d, 977 (1964). This newer approach looks not only to the trustworthiness of the confession, but also to the rights of the accused and the sanctity of the judicial process. It is based on the belief that the right against self-incrimination is not a mere rule of evidence, but a fundamental liberty afforded to the guilty and innocent alike. These dual considerations are important in determining the effect to be given decisions and rules in this area of the

law. (See *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. ed 2d, 882 (1966)).

In relation to the gambling excise tax returns, ther is little danger of their unreliability other than their pos sible understatement of liability. No one would file wagering tax return unless he was engaged in wagerin because he would incur a tax liability; his activities woul become subject to close scrutiny; and he might be prose cuted for a crime which he did not commit. On the othe hand, if he is not engaged in wagering, there is n reason for him to file a return. He is not subject to an "coercion" to confess to crime he has not committe There is no tax, and there is no penalty for not engagin in wagering or for not filing the return if one is no subject to the tax. It therefore cannot be said that th use of Forms 730 or other evidence of excise tax pay ment contributes to the unreliability of the fact findin process in a trial for income tax evasion, or even fo wagering.

There is also the other, now paramount, policy con sideration behind the privilege against self-incrimina tion—the liberty of citizens and the purity of the Courts This was obviously the motivating factor behind the de cisions in *Marchetti* and *Grosso* because—as has bee shown— the coerced confessions in this instance ar highly reliable. In *Marchetti* and *Grosso* the Suprem Court was given a singular opportunity to strike directl at the coercion rather than its fruits. In contrast to othe decisions, such as *Miranda* v. *Arizona*, 384 U.S. 436, 1 L. ed. 2d 694 (1966); and *Escobedo* v. *Illinois*, 378 U.S 478, 12 L. ed. 2d 977 (1964) where the Court sought t halt coercion by destroying its value to the interrogato

it had, in the wagering tax system, an opportunity to end and the coercion directly. Out of deference to the Congressional purpose, and over the objection of the Chief Justice, the Court found that it was better to bar the criminal penalties for refusing to supply the information rather than limit its use. *Marchetti* v. *United States,* 19 L. ed. 2d 889, 903-05 (1968); *Grosso* v. *United States,* 19 L. ed. 2d 906, 913 (1968). It would be inappropriate for this Court to adopt a rule expressly rejected by the Supreme Court.

This is especially true under these circumstances. While the Supreme Court did not lay down an exclusionary rule, this Court is asked to retroactively transform and apply the principles of *Marchetti* and *Grosso* to a case which had reached a final decision prior to their enunciation.

The Supreme Court itself has been reluctant to give retroactive application to the newer Fifth Amendment rules. In *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. ed. 2d 992 (1966) it denied retroactive application to the rules concerning right to counsel and warnings of self-incrimination at criminal interrogations. The Court said, at 384 U.S. 719, 728-29; 16 L. ed. 2d 882, 889:

> Finally, we emphasize the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson* v. *Denno,* supra, (378 U.S. 368, 12 L. ed. 2d 908 (1964)) because confessions are likely to be highly persuasive with a jury and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to *Griffin* v. *California,* supra,

(380 U.S. 609, 14 L. ed. 2d 106 (1965)) despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.

Jackson v. *Denno,* 378 U.S. 609, 12 L. ed. 2d 908 (1964) struck down the New York system of allowing juries to determine the voluntariness of confessions. The rule was made retroactive, despite a previous decision to the contrary, because of the great danger that jurors may have considered or been influenced by coerced and unreliable confessions even after they determined them to be involuntary. *Tehan* v. *Shott,* 382 U.S. 406, 15 L. ed. 2d 453 (1966) held that *Griffin* v. *California,* 380 U.S. 609, 14 L. ed. 2d 106 (1965) prohibiting comment on an accused's failure to testify should not be made retroactive because of the states' justified reliance upon previous decisions of the Court and the devastating effect upon thousands of final convictions.

The rule of *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. ed. 2d 779 (1963) requiring the states to supply counsel to indigent defendants in all felony prosecutions was given retroactive application because the absence of counsel tainted the entire criminal proceeding. On the other hand, the rule of *United States* v. *Wade,* 388 U.S. 218, 18 L. ed. 2d 1149 (1967) requiring the presence of counsel at pre-trial lineup and identification procedures, was denied retroactive effect in the decision of *Stovall* v.

Denno, 388 U.S. 293, 18 L. ed. 2d 1199 (1967), because of the drastic effects of retroactivity on numerous final convictions.

In each of the cases cited, the constitutional infirmity had at least some effect on the integrity and validity of the fact finding process. It became a question of weighing that effect against other considerations such as the reliance placed on previous decisions and the danger of clogging lower courts with numerous old and stale cases. In *Linkletter* v. *Walker,* 381 U.S. 618, 14 L. ed. 2d 601 (1965), the Court refused to apply *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. ed. 2d 108 (1961) which prohibited the introduction of illegally seized evidence in state court proceedings to cases which had become final prior to its decision. It is the archtype of the use of an exclusionary rule to prohibit unconstitutional conduct on the part of law enforcement officers where that conduct did not intrinsically affect the validity of the trial. The fact that physical evidence was illegally seized has no effect on its probative value, but is excluded to prevent police from resorting to illegal seizures.

An examination of these and other cases reveals no instance where the Court has given retroactive application to an exclusionary rule or other Constitutional guarantee where the reliability of the fact finding process had not been jeopardized. The briefs for plaintiff have suggested none. In plaintiff Mackey's trial, the introduction of the wagering tax forms did not jeopardize the integrity of the trial except to the extent that they showed that he was engaged in illegal activities other than that charged. This possibility was raised by Mackey's attorneys at the trial, and apparently on appeal, and both times the Courts held that there was no error.

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Finally, there is the possibility that plaintiff wai
his rights, if any, to have the items excluded on
ground that their admission violated his rights agai
compulsory self-incrimination. Neither plaintiff nor
attorneys raised the privilege against self-incriminat
at the time of trial. It is not claimed that plaintiff fi
the forms or paid the tax under protest. In short, at
time was the question of possible self-incrimination rai
with respect to these forms. On the other hand, it
admitted that plaintiff or his counsel did not know
the decisions in *Marchetti* and *Grosso* at the time
trial. The only law on the topic was found in the de
sions of *United States* v. *Kahriger,* 345 U.S. 22, 97 L.
754 (1953) and *Lewis* v. *United States,* 348 U.S. 419,
L. ed. 475 (1955) which held that the wagering occu
tion tax (Title 26 U.S.C. §4411 as opposed to Title
U.S.C. §4401, the excise tax involved here) was con
tutional and did not violate the privilege against s
incrimination. These decisions were overturned by
decision in *Marchetti* which held that a plea of self
crimination was at least a bar to prosecution. They
not without some effect, however, because in *Grosso*
Court reversed the defendant's conviction for violat
Section 441 even though he had never raised the con
tutional question. The Court stated, at 19 L. ed. 2d
913-14, that the defendant's reliance on the *Kahri*
and *Lewis* decisions precluded considering his silence
a voluntary waiver of his rights. See also *Harris*
United States, 390 F. 2d 617 (8th Cir. 1968). Plain
here argues that he, likewise, cannot be considered
have waived rights which he did not know existed.
situation is not the same, however, because *Kahri*
and *Lewis* did not consider the possibility of self

crimination involved in the excise tax, but only with respect to the occupation tax. One factor considered in both decisions with respect to the occupation tax was its prospective application. That is, the Court suggested that a person did not incriminate himself of having committed a crime by paying the occupation tax, because he was supposed to pay it before he gambled and not afterwards. See *United States* v. *Kahriger,* 345 U.S. 22, 32-33, 97 L. ed. 754, 763 (1953). The excise tax was different because there no tax was due until the wagers were taken and the crime committed. Paying the wagering tax is most places amounts to the admission of a crime, but no decision has been suggested where this was directly challenged. Therefore, if a defendant had wished to raise the constitutional question, he would not have been justified in relying on non-existent decisions, but should have raised it at the first instance, either by not paying the tax and raising the issue when prosecuted, or by paying the tax and objecting to the use of the information thus gained. The plaintiff here did neither. He paid the tax and did not, through his attorneys or otherwise, raise the constitutional question at trial. It is therefore held that he waived any right to have the information excluded on the basis of his privilege against self-incrimination.

In conclusion, it is held that the briefs, records and filed before the Court conclusively show that plaintiff is entitled to no relief on the ground that his right against self-incrimination was violated because, (1) the Supreme Court's reasons for holding that excise tax form were incriminating are unrelated to their possible use in a trial for income tax evasion; (2) the Supreme

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Court itself refused to adopt a rule prohibiting their use at trial; (3) the information is not the product of an unconstitutional statute; (4) the principles plaintiff seeks to draw from the recent decisions should not be applied retroactively in this instance, because the admission of the exhibits in question did not impair the integrity of the fact finding process; and (5) the plaintiff waived any right to have the exhibits excluded on the grounds of self-incrimination by not raising it at trial. The plaintiff's petition for relief under Title 28 U.S.C. §2255 is denied.

/s/ George N. Beamer
U. S. District Judge

Enter: September 6, 1968

APPENDIX C

Judgment

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wednesday, June 4, 1969

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. JULIUS J. HOFFMAN, *District Judge*

FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.